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No. 98-525

In the Supreme Court of the United States

OCTOBER TERM, 1998

OPERATION RESCUE NATIONAL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Tort Claims Act, as amended by the Westfall Act, 28 U.S.C. 2671 and 2679(b)(1), which grants immunity from common law tort actions to "officers or employees" of "the executive departments [and] the judicial and legislative branches," provides Members of Congress with such immunity from suit.

2. Whether the Westfall Act's grant of immunity from suit to Members of Congress is within the scope of Congress's constitutional authority.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 147 F.3d 68. The opinion of the district court (Pet. App. 8a-56a) is reported at 975 F. Supp. 92.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1998. The petition for a writ of certiorari was filed on September 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1988, in response to this Court's decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), Congress amended the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, by enacting the Federal

Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, popularly known as the Westfall Act. The Westfall Act made clear that employees of the federal government have immunity from common law tort actions for acts undertaken in the scope of their official duties. Congress recognized that such immunity is "essential if Federal employees [a]re to be willing to carry out the duties of their office." H.R. Rep. No. 700, 100th Cong., 2d Sess. 2 (1988).

Under the Westfall Act, when an individual employee of the federal government is sued in state court for a wrongful or negligent act, the Attorney General (or her designee) may certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(2). If the Attorney General makes such a certification, then the suit is deemed to be one against the United States, which is then substituted for the employee as the defendant to the tort action, the individual defendant is dismissed from the suit, and the case proceeds against the United States alone, pursuant to the provisions of the FTCA (including removal to federal court). 28 U.S.C. 2679(d)(2); see *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 419-420 (1995). Moreover, the remedies available against the United States under the FTCA are exclusive, and any other action against the individual employee is precluded. 28 U.S.C. 2679(b). In effect, the Westfall Act shields individual government personnel from personal liability for common law tort actions for acts within the scope of their official duties. That immunity attaches even when, as in the present case, sovereign immunity prevents the plaintiff from recovering against the United States under the FTCA. See 28 U.S.C. 2680(h)

(providing that no FTCA remedy shall be available for "any claim arising out of * * * libel [or] slander); *United States* v. *Smith*, 499 U.S. 160, 165-167 (1991).

In the Westfall Act, Congress also amended the FTCA to make clear that its coverage (as to both liability and immunity) extends to torts committed by "officers or employees" of "the judicial and legislative branches." See Pub. L. No. 100-694, § 3, 102 Stat. 4564 (amending 28 U.S.C. 2671). By that amendment, Congress sought to ensure that judicial and legislative personnel would "be covered by the FTCA in the same way as employees of the Executive Branch." H.R. Rep. No. 700, *supra*, at 8. Congress also provided that the United States, as the substituted defendant, would be able to invoke any defenses of judicial or legislative immunity that would be available to the original defendant. See Pub. L. No. 100-694, § 4, 102 Stat. 4564 (amending 28 U.S.C. 2674).

2. On November 15, 1993, United States Senator Edward M. Kennedy attended a fund-raising luncheon at the Boston Park Plaza Hotel. Pet. App. 17a. At a press conference following the luncheon, Senator Kennedy addressed issues of public concern, including a then-pending bill to enact what became the Freedom of Access to Clinic Entrances Act of 1994 (FACE).[1] *Id.* at 18a. Senator Kennedy was the principal sponsor of that legislative proposal, which created federal criminal penalties and civil remedies for the use or threat of violence, physical obstruction, or destruction of property to interfere with access to facilities providing reproductive health care. *Id.* at 16a. The full Senate

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[1] S. 636, 103d Cong., 1st Sess. (1993). That bill subsequently was enacted into law, as Pub. L. No. 103-259, § 3, 108 Stat. 694 (codified at 18 U.S.C. 248).

was scheduled to take up debate on that measure on November 16, 1993, the day after the press conference at issue. *Id.* at 19a.

At the press conference, in response to a question regarding the reasons for the Senator's support for the FACE, the Senator stated:

> Basically, this is legislation to deal with violence and constitutional rights. We're talking about access to a facility for a woman to be able to have her constitutional rights protected, but many of these facilities also provide extremely important services and preventative health care, prescreening, mammography, pap smears, and a number of other health-related items. [P]eople can have a difference on public policy issues, but when we have a national organization like Operation Rescue that has as a matter of national policy firebombing and even murder, that's unacceptable. This is a very targeted legislative remedy to deal with that kind of situation which exists in Massachusetts and in many other parts of the country. Massachusetts in the last two weeks has taken steps to address it and I think it's important that we did.

Pet. App. 18a.

3. a. In November 1994, petitioners brought this suit against Senator Kennedy in the Superior Court for Norfolk County, Massachusetts, claiming that they were defamed by the Senator's remarks. Pet. App. 9a. The United States Attorney for the District of Massachusetts, acting under a delegation of authority from the Attorney General, see 28 C.F.R. 15.3(a), made the requisite statutory certification under the Westfall Act that the Senator's remarks were made within the scope of his official duties. Pet. App. 9a. Based on that cer-

tification, the United States invoked the removal and substitution provisions of the Westfall Act, pursuant to which the action was removed to federal district court, and the United States was substituted as the sole defendant. *Ibid.*

b. In district court, the United States moved to dismiss the action on the ground, *inter alia*, that the FTCA expressly bars defamation actions. See 28 U.S.C. 2680(h). The district court granted the United States' motion to dismiss. Pet. App. 56a. The court rejected petitioners' argument that Senator Kennedy is not protected by the Westfall Act, concluding that Members of Congress fall within the definition of "employee[s] of the Government" under the FTCA. *Id.* at 23a-35a. The court noted that the FTCA defines "employees of the Government" for purposes of that statute to include "officers and employees" of the "legislative branch[]." *Id.* at 28a. It also stressed that, in several other contexts, Congress has used the term "officers" to include Members of Congress, see *id.* at 29a-31a; *Lamar* v. *United States*, 241 U.S. 103 (1916), and that such usage is within the ordinary meaning of the term "officer." The court also aligned itself with the Fifth Circuit's decision in *Williams* v. *United States*, 71 F.3d 502, 504-505 (1995), which concluded that the Westfall Act applies to Members of Congress.

The court rejected petitioners' arguments that the Westfall Act would be unconstitutional if applied to shield Members of Congress from personal liability. The court emphasized Congress's broad authority under the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, and concluded that Congress may invoke that power to protect its own ability effectively to carry out its basic power to legislate, as reflected in Article I, Section 1. Pet. App. 42a-51a. In addition, the

court rejected petitioners' assertions that the Speech or Debate Clause, U.S Const. Art. I, § 6, Cl. 1, prohibits application of the Westfall Act to Members of Congress. Pet. App. 51a-56a.

4. The court of appeals affirmed. Pet. App. 1a-7a. The court rejected (*id.* at 4a-5a) petitioners' argument that, because Congress has often referred to Members of Congress in statutes as "members" rather than "officers" or "employees," Congress's omission of the term "members" in the Westfall Act's amendment of the FTCA should be taken as indicative of intent not to cover Members of Congress in that amendment. That argument failed, the court concluded, because, in the Westfall Act, Congress simply amended the term "federal agency" to include the legislative and judicial branches; it did not affirmatively use any "restrictive language" with the intent to exclude Members of Congress. And the Court agreed with the district court's rejection of petitioners' argument that, as a matter of law, Members of Congress are not "officers" or "employees" of the government. *Id.* at 5a-6a. The court further rejected petitioners' contention that the Speech or Debate Clause defines a "ceiling rather than a floor" of immunity from suit available to Members of Congress, and that the Westfall Act is unconstitutional, describing petitioners' contention as based on "singular logic." *Id.* at 7a.

ARGUMENT

The decision below is correct. It is also in accord with the decision of the only other court of appeals that has addressed the question whether the Westfall Act applies to Members of Congress. See *Williams* v. *United States*, 71 F.3d 502, 505 (5th Cir. 1995); cf. *Sullivan* v. *United States*, 21 F.3d 198, 203 n.8 (7th Cir.)

(suggesting that federal judges also have immunity under the Westfall Act), cert. denied, 513 U.S. 1060 (1994). Further review is therefore not warranted.

1. a. The court of appeals correctly concluded that a straightforward reading of the pertinent statutory language shows that Members of Congress fall within the broad range of "employee[s] of the Government" to whom the FTCA and the Westfall Act apply. The FTCA expressly defines "[e]mployee of the government" to include "officers or employees of any federal agency." 28 U.S.C. 2671. "Federal agency," in turn, expressly includes "the judicial and legislative branches * * * of the United States." 28 U.S.C. 2671. Senator Kennedy was therefore exempt from liability under the Westfall Act because he is an "officer" of the "legislative branch * * * of the United States."

The pivotal statutory language, used both in creating a remedy against the United States and in making that remedy exclusive, refers to "any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 1346(b), 2679(b)(1). As just noted, the FTCA further defines those terms in 28 U.S.C. 2671, where "[e]mployee of the government" is broadly defined to include "officers or employees of any federal agency * * * and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." 28 U.S.C. 2671. "Federal agency," in turn, was given a broad definition in language that includes "the judicial and legislative branches" of government. 28 U.S.C. 2671. The latter provision was added by the Westfall Act to "explicitly extend[] the coverage of the FTCA to officers and employees of the legislative and judicial

branches." H.R. Rep. No. 700, *supra*, at 5. See also *Williams*, 71 F.3d at 505.

The court of appeals correctly recognized that the ordinary meaning of the word "officer" is entirely consistent with application of the Westfall Act to Members of Congress. Pet. App. 6a. In common parlance, the term "officer" applies to "one who holds an office" or "one who is appointed or elected to serve in a position of trust, authority, or command." *Id.* at 31a (quoting *Webster's Third New International Dictionary* 1567 (1976)). These definitions reflect the "plain meaning" of the term "officer" and comport with a United States Senator's position as an official elected to a position of trust to serve as a representative of the people. See *Williams*, 71 F.3d at 505.[2]

The court of appeals' reading of the FTCA and the Westfall Act to include Members of Congress also is fully consonant with the dual purposes of those Acts: providing compensation to persons injured by federal personnel, and ensuring that federal personnel are not deterred from fully carrying out their duties. By including Members of Congress within the definition of

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[2] Other aspects of the FTCA also support the decision below. First, the FTCA, as amended by the Westfall Act, allows the United States, once it is substituted as a defendant for the individual officer or employee, to invoke any defense of judicial or legislative immunity that could have been invoked by the individual defendant. 28 U.S.C. 2674. This suggests that Congress intended the Westfall Act to cover those who were covered by legislative immunity, including Members of Congress. And even if there were doubt as to whether Senator Kennedy were an "officer" of the Legislative Branch, the FTCA's definition of "[e]mployee" also covers "persons acting on behalf of a federal agency in an official capacity," 28 U.S.C. 2671, language plainly broad enough to cover a United States Senator fulfilling his official functions.

"[e]mployee" of the federal government, Congress ensured that negligent acts committed by Members of Congress in the scope of their employment (as, for example, a negligent automobile accident) could form the basis of liability against the United States if the FTCA permitted such liability; petitioners' construction, by contrast, would preclude recovery against the United States in all such circumstances. At the same time, the Westfall Act's extension of immunity from personal liability for common law tort actions to Members of Congress ensures that such Members, like other federal officers, are not unduly chilled in executing their official functions by the prospect of lawsuits and damages.

b. Petitioners argue (Pet. 8-12) that the term "officer" as used in federal statutes has a constitutionally based meaning, predicated on the Incompatibility Clause, U.S. Const. Art. I, § 6, Cl. 2, that necessarily excludes Members of Congress. This Court, however, has construed the term "officers" in a federal statute to include Members of Congress. In *Lamar* v. *United States*, 241 U.S. 103 (1916), the Court held that a Member of Congress is an "officer acting under the authority of the United States" within the meaning of a criminal statute punishing the impersonation of such an officer. *Id.* at 112-113. In so doing, the Court specifically rejected the argument that interpretation of such a statute must be dictated by the use of the term "officer" in the Incompatibility Clause; the Court looked instead to the ordinary meaning of the term as found in dictionaries, as well as a consideration of the terms and purposes of the statute as a whole. *Ibid.* Similarly, a broad reading of the term "officer" has been adopted in a line of lower-court decisions holding Members of Congress to be "officer[s] of the United States" for the

purposes of 28 U.S.C. 1442(a)(1), which permits federal officers to remove state court actions to federal court. See *Brown & Williamson Tobacco Corp.* v. *Williams*, 62 F.3d 408, 412-415 (D.C. Cir. 1995); *Williams* v. *Brooks*, 945 F.2d 1322, 1325 n.2 (5th Cir. 1991), cert. denied, 504 U.S. 931 (1992); *Richards* v. *Harper*, 864 F.2d 85, 86-87 (9th Cir. 1988). Petitioners' textual arguments are therefore without merit.

2. The court of appeals also correctly concluded that Congress has the constitutional authority to grant its Members immunity from common law tort suits. As the lower courts observed, see Pet. App. 7a, the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, affords Congress broad authority to enact legislation that Congress deems necessary to carry out its underlying constitutional powers. See *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). That authority is sufficient to sustain the grant of immunity to legislators in the Westfall Act, which reflects Congress's determination that such immunity is necessary to protect the official functions of federal legislators.

In order for Congress to exercise any of the powers enumerated in the Constitution, its Members must have the ability to legislate. The Constitution itself grants Members of Congress immunity from suit based on their acts of debate and voting in the Houses themselves. U.S. Const. Art. I, § 6, Cl. 1 (Speech or Debate Clause). But Congress could rationally conclude that, to be effective legislators, Members of Congress must have a broader immunity, extending to all acts in the scope of their official duties, and not just debate and voting. As the district court observed, to serve their constituents and the public faithfully, Members of Congress are expected to inform constituents and the public at large about issues of public concern being con-

sidered by Congress. Pet. App. 48a (citing *Williams*, 71 F.3d at 507). It was therefore reasonable for Congress to conclude "that its members would be aided in their effort to inform their constituents, to provide leadership on issues of public importance and, in the process of being more candid and forthcoming, to be more readily accountable to those who elected them if they were not inhibited by the threat of lawsuits and liability for the statements they made outside of Congress in performing these functions." *Id.* at 49a.

This Court has frequently recognized Congress's authority to define the scope of federal officers' immunity from suit. See, *e.g.*, *Butz* v. *Economou*, 438 U.S. 478, 500, 504 (1978) (refusing to accord federal officials a higher degree of common law immunity from liability than that accorded state officials "in the absence of congressional direction to the contrary"); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 747 (1982); *id.* at 790 (White, J., dissenting); cf. *Clinton* v. *Jones*, 117 S. Ct. 1636, 1652 (1997) (noting that Congress may "respond with appropriate legislation" if it believes that the President should be granted immunity beyond that already recognized by the courts). Indeed, in *Westfall* this Court specifically invited congressional action to address the scope of federal official immunity, recognizing that "Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context." 484 U.S. at 300. Congress's extension of Westfall Act immunity to Members of Congress reflects its recognition that the policies supporting official immunity from common law suits are as applicable to the official functions of federal legislators as to officers and employees of the other Branches.

Petitioners' suggestion that Congress does not possess constitutional authority to grant its Members immunity beyond that conferred upon them by the Speech or Debate Clause (Pet. i, 25) is without merit. That Clause, which provides that "for any Speech or Debate in either House" the Members of Congress "shall not be questioned in any other Place," U.S. Const. Art. I, § 6, Cl. 1, is included in the text of the Constitution among the privileges of Members of Congress, not among the limitations on Congress's power set forth in Article I, Section 9. Thus—quite to the contrary of petitioners' supposition—the structure of the Constitution strongly indicates that the Speech or Debate Clause imposes no prohibition upon legislation that otherwise is properly within the power of Congress to enact.

This Court has specifically rejected the proposition that the Speech or Debate Clause impliedly precludes the development of further immunities not expressly called for in the Constitution. See *Nixon* v. *Fitzgerald*, 457 U.S. 731, 750 n.31 (1982) (rejecting the argument that because the Speech or Debate Clause provides a textual basis for congressional immunity, "the Framers must be assumed to have rejected any similar grant of executive immunity"). It is undisputed, moreover, that Congress has authority to grant immunity from suit to officials and employees in the other Branches of government. Under petitioners' constitutional theory, however, Congress would be the only Branch of government subject to a constitutional ceiling on its immunity—simply because the Framers singled it out for *protection* by providing a constitutional floor of immunity in the Speech or Debate Clause. Nothing in precedent, logic, or the text of the Constitution supports such an anomalous result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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